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Nos. 91-1367, 91-1533 and 91-1596

In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID A. STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH LEVINE AND MELVIN KAMINSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service (Nos. 91-1533 and 91-1596 only).

2. Whether testimony of foreign witnesses from court-ordered depositions conducted in Switzerland with the participation of all interested parties and counsel was properly admitted at petitioners' criminal trial.

3. Whether 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause (Nos. 91-1533 and 91-1596 only).

4. Whether petitioner Reuben Sturman was entitled to challenge factual assertions made by the United States to the Swiss government in obtaining Swiss bank records pursuant to a mutual assistance treaty (No. 91-1596 only).

5. Whether the trial judge was required to recuse himself (No. 91-1596 only).

6. Whether separate fines could be imposed on petitioner Reuben Sturman for filing a false income tax return (26 U.S.C. 7206(1)) and attempted tax evasion (26 U.S.C. 7201) (No. 91-1596 only).

7. Whether the reporting requirements of the Bank Secrecy Act violate the Fifth Amendment privilege against compelled self-incrimination (No. 91-1596 only).

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Statement	2
Argument	9
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Barber v. *Page*, 390 U.S. 719 (1968)	20
California v. *Byers*, 402 U.S. 424 (1971)	28
California v. *Green*, 399 U.S. 149 (1970)	20
Cardenas v. *Smith*, 733 F.2d 909 (D.C. Cir. 1984)	25
Coy v. *Iowa*, 487 U.S. 1012 (1988)	20
Dennis v. *United States*, 384 U.S. 855 (1966)	9, 10
Gomez v. *United States*, 490 U.S. 858 (1989)	17
Grosso v. *United States*, 390 U.S. 62 (1968)	28
Idaho v. *Wright*, 110 S. Ct. 3139 (1990)	19, 24
Kirby v. *Illinois*, 406 U.S. 682 (1972)	17
Manson v. *Brathwaite*, 432 U.S. 98 (1977)	18
Marchetti v. *United States*, 390 U.S. 39 (1968)	28
Mattox v. *United States*, 156 U.S. 237 (1895)	19
Ohio v. *Roberts*, 448 U.S. 56 (1980)	19, 20, 24
Peretz v. *United States*, 111 S. Ct. 2661 (1991)	16-17, 18
Ruch v. *Rock Island*, 97 U.S. 693 (1878)	21
Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984)	28
Spies v. *United States*, 317 U.S. 492 (1943)	27
Tanner v. *United States*, 483 U.S. 107 (1987)	9
United States v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991)	11
United States v. *Davis*, 767 F.2d 1025 (2d Cir. 1985)	24, 25
United States v. *Franks*, 723 F.2d 1482 (10th Cir. 1983), cert. denied, 469 U.S. 817 (1984)	27
United States v. *Gifford*, 892 F.2d 263 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990)	16, 17

Cases—Continued: Page

United States v. *Hing Shair Chan*, 680 F. Supp. 521 (E.D.N.Y. 1988) 24
United States v. *Inadi*, 475 U.S. 387 (1986) 19
United States v. *Johnpoll*, 739 F.2d 702 (2d Cir.), cert. denied, 469 U.S. 1075 (1984) 25
United States v. *Kelly*, 892 F.2d 255 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) 16
United States v. *Lovasco*, 431 U.S. 783 (1977) 17
United States v. *Miller*, 380 F.2d 1073 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988) 23-24
United States v. *Miller*, 425 U.S. 435 (1976) .....
United States v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989) 7, 10, 11
United States v. *Raddatz*, 447 U.S. 667 (1980) 18
United States v. *Reynolds*, 919 F.2d 435 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991) 11
United States v. *Salim*, 855 F.2d 944 (2d Cir. 1988) 14, 16, 22
United States v. *Sullivan*, 274 U.S. 259 (1927) 28
United States v. *Tedder*, 801 F.2d 1437 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987) 24
White v. *Illinois*, 112 S. Ct. 736 (1992) 19, 20
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10

Constitution, treaty, statutes, regulation and rules:

U.S. Const.:
Art. III 16, 17, 18
Amend. V 17, 19, 28
Amend. VI 17, 19
Confrontation Clause 8, 20, 22, 24
Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8302 ..... 13, 25
Bank Secrecy Act, 31 U.S.C. 5311 *et seq.* 8, 27
Court Reporters Act, 28 U.S.C. 753(b) 22
Internal Revenue Code (26 U.S.C.):
§ 7201 2
§ 7206(1) 27
§ 7206(4) 10

Statutes, regulation and rules—Continued: Page

18 U.S.C. 371 ..... 2, 9
18 U.S.C. 1503 2
18 U.S.C. 3505 ..... 8, 23, 24
18 U.S.C. 3505(b) 24
28 U.S.C. 455 26
28 U.S.C. 455(a) 26
31 U.S.C. 1059 2
31 U.S.C. 5314 27
31 U.S.C. 5322 2
31 C.F.R. 103.24 27
Fed. R. Civ. P.:
Rule 28 13
Rule 28(b) 13
Rule 31 13
Fed. R. Crim. P.:
Rule 15 ..... 5, 7, 12, 15, 16, 17
Rule 15(a) 12
Rule 15(b) 12
Rule 15(c) 12
Rule 15(d) 12, 14
Rule 15(e) 11, 12
Fed. R. Evid.:
Rule 104(a) 24
Rule 804(b)(1) 11, 19

Miscellaneous:

4 D. Louisell & C. Mueller, *Federal Evidence* (1980) 21
1 J. Stephen, *A History of the Criminal Law of England* (1883) 20
Advisory Committee Notes on 1963 Amendment, 28 U.S.C. at 625 14

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) [1] is reported at 951 F.2d 1466.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1991. Petitions for rehearing were denied on January 8, 1992. The petition for a writ of certiorari in No. 91-1367 was filed on February 26, 1992; the petition in No. 91-1533 was filed on March 24, 1992; and the petition in No. 91-1596 was filed on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service.[2] Petitioner Reuben Sturman was convicted of several additional offenses: five counts of attempted income tax evasion (26 U.S.C. 7201); five counts of making and subscribing a false income tax return (26 U.S.C. 7206(1)); four counts of willfully failing to maintain records and file reports of transactions and relationships with a foreign financial institution (31 U.S.C. 1059, as recodified at 31 U.S.C. 5322, effective September 13, 1982); and one count of obstructing justice (18 U.S.C. 1503). The district court sen-

[1] Unless otherwise noted, references are to the petition appendix in No. 91-1367.

[2] Petitioner Kaminsky entered a conditional guilty plea and joined in the appeal in this case.

tenced petitioner David Sturman to a four-year prison term; in addition, he was fined $10,000 and ordered to pay $73,651.55 in costs of prosecution equally with petitioner Reuben Sturman. Petitioner Ralph Levine was sentenced to a three-year prison term and a $10,000 fine. Petitioner Melvin Kaminsky was sentenced to a one-year prison term, to be followed by two years' probation and a $50,000 fine. Petitioner Reuben Sturman was sentenced to a total of ten years' imprisonment, was fined $2,460,000, and was ordered to pay $73,651.55 in costs of the prosecution equally with petitioner David Sturman. The court of appeals affirmed. Pet. App. 1a-42a.

1. The evidence at trial showed that, from 1968 through 1987, petitioners conspired among themselves and with others to obstruct the lawful functions of the IRS in the assessment and collection of taxes owed by Reuben Sturman. Reuben Sturman engaged in the production, distribution, and sale of sexually explicit books and other materials. David Sturman was responsible for his father Reuben's businesses in the San Francisco area. Levine ran the Nevada businesses, while Kaminsky ran Reuben Sturman's principal business, Sovereign News Company. Pet. App. 2a-3a.

Reuben Sturman skimmed cash profits from his adult bookstores, peep shows, and other businesses. He concealed his ownership of those businesses by establishing more than 150 domestic corporations and five foreign corporations in countries with strict secrecy policies. The domestic companies were owned by nominees and run by fictitious officers. Reuben Sturman also opened several Swiss bank accounts with the stated goal of "conceal[ing] his money" and "avoid[ing] taxes." Money was transferred to

the Swiss accounts through a series of transfers involving the domestic and foreign companies. Pet. App. 2a-3a; Gov't C.A. Br. 3-35.

Reuben Sturman did not report all of his income and corporate transactions to the IRS; indeed, he reported less than 11 percent of his income between 1978 and 1982. His unreported income for those years was $2,735,713, creating a tax liability of $1,442,945. Moreover, he improperly failed to disclose on tax forms his various foreign accounts. Pet. App. 3a; Gov't C.A. Br. 31-35.

2. David Sturman, Levine, and Kaminsky, in addition to running various of Reuben Sturman's businesses, helped conceal Reuben's overall assets and income in several ways. For example, David Sturman was the director and nominee shareholder of Societe Financiere, a Liberian shell company used by Reuben Sturman to receive and funnel proceeds from his adult entertainment businesses. David Sturman also had signature authority over Societe Financiere's Swiss bank account, as well as more than 20 other Swiss accounts that were used to conceal assets and income. David and Reuben Sturman signed the names of fictitious persons to most of the accounts. For example, in 1974, Reuben Sturman used a false Dutch passport to open two Swiss accounts under the alias of Paul Bekker. When Reuben Sturman was later arrested by Swiss authorities for falsifying identification papers, the authorities seized a document signed by Sturman in which "Paul Bekker" granted power of attorney for those two accounts to David Sturman. Reuben Sturman admitted to Swiss authorities that he used the account to receive proceeds funneled from his American businesses. Pet. App. 2a, 9a; Gov't C.A. Br. 12-13, 15, 57-58.

Similarly, Levine aided Reuben Sturman in concealing assets from the IRS. Jack Marcum, who was employed by Levine and Reuben Sturman, testified that at least $70,000 per month from the Nevada businesses went unrecorded. Levine also had signature authority (under various aliases) over several Swiss bank accounts, which were never reported to the IRS. Finally, Kaminsky, the manager of Reuben Sturman's principal business, provided substantial assistance to Reuben Sturman's efforts to conceal his financial interests from the IRS. Pet. App. 9a-10a; Govt's C.A. Br. 5-6.

3. In 1985, the district court issued a pretrial order authorizing overseas depositions of Swiss bank officials pursuant to Fed. R. Crim. P. 15. Pet. App. 43a. Those depositions, and the trial itself, were delayed several years as petitioners raised various objections both in this country and in Switzerland. See *id.* at 44a. In an order dated May 4, 1989, the district court noted that "[o]n April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court." *Id.* at 48a. The order noted that the depositions would be held before Swiss Magistrate Benedikt Holdener in Zurich during the week of June 5-9, 1989. *Ibid.* The court ordered that "direct examination (as opposed to cross-examination)" questions for the five Swiss witnesses be submitted in writing to Magistrate Holdener no later than May 22, 1989. *Id.* at 48a-49a. The government was ordered to pay the travel expenses for petitioners and their attorneys. *Id.* at 45a, 49a.

Petitioners were represented at the depositions by eight American attorneys and six Swiss attorneys.[3]

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[3] Although petitioners all had the right to be present, Reuben Sturman was the only petitioner who personally attended the depositions.

At the outset of each deposition, Magistrate Holdener warned the witness of the penalties under Swiss law for giving false testimony. Holdener then posed to each witness the questions submitted by the government. The proceedings were conducted in the German language, but English translations were provided by an official Swiss interpreter. In addition, the six bilingual Swiss attorneys provided the defense team with a virtually verbatim translation of the German questions and answers. After direct examination, defense counsel submitted oral questions to Holdener, who again posed them to the witness. All questions posed by defense counsel, except one relating to the compensation of one witness, were asked of the witness. Although an American court reporter was present, Holdener contemporaneously dictated the official, substantially verbatim summary version of the testimony. At the conclusion of each deposition, the witness read Holdener's summary, was permitted to correct any inaccuracies, and then signed it. Pet. App. 21a; Gov't C.A. Br. 91-92.

4. The trial of this case lasted three months. The written summaries of the Swiss depositions that were read into the record at trial in question and answer form occupied fewer than 60 of the 5000 pages of transcript. See C.A. Jt. App. 2003-2059. The depositions concerned some of the Swiss bank accounts that petitioners had opened under various names. *Ibid.*

The district court admitted the depositions after reviewing them and considering defense objections. The court found that "the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to

the magistrate for answers by the witnesses." Pet. App. 21a.

5. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-42a. The court first held that petitioners properly were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 3a-7a. The court distinguished its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989). Pet. App. 5a-7a. In addition, the court rejected challenges by petitioners David Sturman and Levine to the factual sufficiency of the evidence and to the factual support for the existence of a single conspiracy. *Id.* at 8a-12a.

The court of appeals next held that the Swiss depositions had properly been admitted. Pet. App. 20a-24a. The court held that there had been substantial compliance with Fed. R. Crim. P. 15 and that petitioners' constitutional rights had been protected. Pet. App. 22a-23a. The court explained that "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony" but that "[h]ere, all steps were taken to ensure [petitioners'] rights while respecting the legal rules established in a different country." *Id.* at 22a. Addressing petitioners' specific challenges to the Swiss procedures, the court noted that "[a]ll defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later." *Ibid.* (footnote omitted). The court also noted that, "[a]lthough the witnesses were not given an oath, [the] defense conceded that each witness was told the penalties for giving false testimony." *Ibid.* The court found that petitioners "failed to point to any way in which they were prejudiced by the procedures used." *Id.* at 23.

The court also rejected claims that Swiss Magistrate Holdener should not have been allowed to preside over the depositions because he was not impartial. Pet. App. 23a. The court noted that, although Swiss law "permits a person to serve as both magistrate and prosecuting attorney," petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced [petitioners] or that the testimony could be considered unreliable." *Ibid.* Finally, the court rejected challenges to the manner in which one Swiss deponent had identified Reuben Sturman as a former customer. *Id.* at 23a-24a.

The court further held that "[v]olumes of business records from seven foreign banks" had properly been admitted at trial pursuant to 18 U.S.C. 3505. Pet. App. 39a-42a. The court explained that the statutory prerequisites to admission of foreign business records had been satisfied, and that the statute did not violate the Confrontation Clause. *Ibid.*

Finally, in addition to other claims not renewed by petitioners in this Court, the court of appeals rejected several claims that only petitioner Reuben Sturman renews. The court held that Reuben Sturman was not entitled to challenge factual assertions made by the United States in obtaining Swiss bank records pursuant to a mutual assistance treaty (Pet. App. 26a-31a); that the district court was not required to recuse itself (*id.* at 24a-26a); that the district court permissibly imposed consecutive fines for filing a false income tax return and for attempted tax evasion (*id.* at 36a-37a); and that the reporting requirements of the Bank Secrecy Act do not violate the Fifth Amendment privilege against compelled self-incrimination (*id.* at 34a-36a).

ARGUMENT

1. Petitioners Levine and Kaminsky (91-1533 Pet. 4-12) and petitioner Reuben Sturman (91-1596 Pet. 29-30) seek further review of their claim that they were improperly convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. There was overwhelming evidence that petitioners conspired to conceal Reuben Sturman's assets from the Internal Revenue Service. Petitioners claim, however, that such a conspiracy should not be actionable under 18 U.S.C. 371 as a conspiracy to defraud the United States. That claim is meritless.

The federal conspiracy statute, 18 U.S.C. 371, prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." This Court has broadly interpreted the "defraud" clause of the conspiracy statute, holding that it "reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (quotation omitted). Accordingly, the Court has rejected any suggestion that the "offense" and "defraud" clauses are mutually exclusive, such that a prosecution under the latter clause turns on whether defendants conspired to commit a specific substantive offense. For example, in *Dennis* v. *United States*, 384 U.S. 855 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. 1001" and that their misconduct "may not properly be laid under

the conspiracy-to-defraud clause of § 371." 384 U.S. at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864.

Petitioners claim (91-1533 Pet. 5-12) that the Sixth Circuit's decision in this case conflicts with its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989). Even if petitioners were correct, further review by this Court would not be warranted to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the court of appeals in this case carefully distinguished its prior holding in *Minarik*. See Pet. App. 4a-7a. *Minarik* held that the offense and defraud clauses of the conspiracy statute were mutually exclusive "as applied to the facts of [that] case." 875 F.2d at 1187. The facts in *Minarik*, which involved the concealment of assets after a taxpayer had received assessment notices, fell squarely within the prohibition contained in 26 U.S.C. 7206(4) relating to post-assessment concealment. See 875 F.2d at 1187, 1194-1195. Although the government could have brought a straightforward charge of conspiracy to violate 26 U.S.C. 7206(4), it instead proceeded under the defraud clause while changing its theory of the case several times without further specifying the charge. See 875 F.2d at 1187, 1190. Notwithstanding broader dicta in the opinion, the *Minarik* court's actual holding was very narrow: "[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that

a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause." *Id.* at 1196. The court took pains "to emphasize the limits of our holding." *Id.* at 1195-1196.

We believe that *Minarik* was wrongly decided even on its own facts. The decision finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is unworkable in practice. But even assuming that *Minarik* was correctly decided, the court of appeals correctly declined to extend it to the very different factual setting of this case. Unlike *Minarik*, the conspiracy here was far broader than the violation of a single substantive statute. As the court of appeals explained (Pet. App. 7a), "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses." As the court of appeals also explained (*ibid.*), the "chief concern" in *Minarik* "was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him." Here, in contrast, "[t]he prosecution has presented the case clearly and no confusion as to the charges is evident." *Ibid.*[4]

2. The Swiss deposition testimony was properly admitted under Fed. R. Evid. 804(b)(1) and Fed. R. Crim. P. 15(e). Rule 804(b)(1) allows the ad-

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[4] Other courts have declined to give *Minarik* the broad reading petitioners seek to accord it, and this Court has denied certiorari notwithstanding claims that those decisions conflict with *Minarik*. See, *e.g.*, *United States* v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991); *United States* v. *Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991).

mission of testimony given by unavailable witnesses at "a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redict examination." Rule 15(e) likewise provides that "[a]t the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable."

The procedures followed in ordering and taking the Swiss depositions complied with Fed. R. Crim. P. 15. Subsection (a) of that Rule allows depositions "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Petitioners do not challenge the district court finding that this case satisfied the prerequisites of subsection (a). Subsection (b) of the Rule requires adequate advance notice, and subsection (c) requires government payment of defense travel and subsistence expenses. Again, petitioners do not suggest that the Swiss deposition proceedings failed to satisfy these provisions.

Petitioners claim that the Swiss depositions failed to comply with subsection (d) of Rule 15. That provision, in pertinent part, reads as follows:

> **(d) How Taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope

> and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The depositions in this case were "taken" in the manner provided in civil actions. Although cross-examination was not done "directly by counsel" (91-1367 Pet. 22), the civil rules expressly provide for "depositions upon written questions" (Fed. R. Civ. P. 31). Similarly without merit are complaints (91-1367 Pet. 16-17, 22-24) that the Swiss witnesses were not placed under oath and there was no "verbatim transcript." The federal civil discovery rules incorporated by Criminal Rule 15(d) recognize that, as the court of appeals explained (Pet. App. 22a), "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony." Thus, Fed. R. Civ. P. 28(b) provides: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar deparure from the requirements for depositions taken within the United States under these rules."[5] The Advisory Committee notes to Rule 28 explain:

> [T]he courts of other countries may be expected to follow their customary procedure for

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[5] The Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8302 (1973) (*reprinted in part* at Pet. App. 76a-83a), allows a request for assistance to be made by the "Central Authority" (defined as "the Attorney General or his designee") and thus obviates the need for an American court to issue a letter rogatory. No substantive difference flows from the fact that a letter rogatory was not issued in this case, however, and the clear intent of the federal rules is that foreign depositions need not follow the precise form of depositions taken in this country.

> taking testimony. In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. The last sentence of [Rule 28(b)] provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative.

Notes of Advisory Committee on Rules—1963 Amendment (citations omitted), 28 U.S.C. at 625.

Nor is there merit to the claim (91-1367 Pet. 16-17, 22-24) that clause (2) of Fed. R. Crim. P. 15(d) disallows foreign depositions unless witnesses are placed under oath, there is a verbatim transcript, and the examination and cross-examination are done directly by counsel. While that clause requires that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself," it plainly addresses the method of "examination" rather than the method in which depositions are "taken." As the court explained in *United States* v. *Salim*, 855 F.2d 944, 950-951 (2d Cir. 1988) (emphasis in original; some citations omitted):

> Rule 15(d) begins incorporating the manner of *taking* a deposition in a civil case. It then distinguishes the manner of *examining* a witness, and imposes some additional limitations with respect to the scope and manner of the latter. * * *
>
> Restrictions on the manner in which the deposition is *taken* concern such issues as the person

before whom the deposition should be taken, how the deposition should be recorded, and how transcripts should be certified and filed. By contrast, the limitation on the scope and manner of *examination* concerns the permissible subject matter and form of the questions, respectively, that may be asked of the witness. This latter provision of the rule appears to require only that the examination and cross-examination be conducted by properly formulated questions in a manner reasonably calculated to elicit admissible testimony. Thus, the additional restriction on *scope* found in Rule 15(d) limits questioning to those matters permitted under Fed. R. Evid. 401, whereas the rule applicable to civil cases permits a much broader inquiry, *see* Fed. R. Civ. P. 26(b). The restriction on the *manner* of examination limits the form of the questions, and concerns such matters as the entitlement to ask leading questions of a hostile witness, *see* Fed. R. Crim. P. 15(d)(2) advisory committee note (1974).

Contrary to petitioner David Sturman's claim (91-1367 Pet. 22-24), there is no conflict among the federal courts of appeals concerning the application of Rule 15. None of the decisions he cites found that a deposition was properly excluded or improperly admitted in evidence, nor has any court held that procedures such as those followed here do not satisfy Rule 15. Indeed, courts have upheld foreign deposition procedures far less protective of defendants' rights than those followed here. For example, *Salim* not only involved the same procedures that petitioner complains about here (*e.g.*, questioning by a French magistrate rather than the attorneys directly, partial summaries by the magistrate rather than a complete verbatim transcription, lack of formal oath) but, in addition, neither defendant nor his counsel were al-

lowed to attend the deposition. See 855 F.2d at 946-952 (describing and upholding procedures). Similarly, in other cases, defendants were not personally allowed to confront the foreign deponents. *E.g.*, *United States* v. *Gifford*, 892 F.2d 263, 264-265 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (absence of incarcerated defendant from Belgian depositions did not violate Rule 15); *United States* v. *Kelly*, 892 F.2d 225, 260-263 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (companion case to *Gifford*).[6] While the exact procedures vary from case to case and from country to country, the federal courts of appeals consistently have interpreted Rule 15 as flexible enough to accommodate those procedural differences.

Nor is there merit to petitioners' claims that taking the Swiss depositions and admitting the deposition testimony were unconstitutional.

a. Petitioner David Sturman argues, for the first time in this Court, that the taking of the Swiss depositions violated his Article III right to have a federal judge preside at all critical stages of his criminal "trial." 91-1367 Pet. 19-21 (citing *Peretz* v. *United*

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[6] Petitioner David Sturman claims that "[t]he Third Circuit has emphasized that the procedures the Third Circuit approves 'are in stark contrast to those approved [by the Second Circuit] in *United States* v. *Salim*' " (91-1367 Pet. 24, quoting *Kelly*, 892 F.2d at 262 n.6). But no Third Circuit (or other federal) case suggests, let alone holds, that the procedures followed in *Salim* are legally inadequate. On the contrary, the Third Circuit in both *Kelly* and the companion case of *Gifford*, like the Sixth Circuit in the present case, cited *Salim* with full approval. The *Kelly* footnote cited by petitioner, far from condemning the *Salim* procedures, simply illustrated that the claim raised in *Kelly* was factually even weaker than the claim rejected in *Salim*.

States, 111 S. Ct. 2661, 2665 (1991)); see *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)). Since no party raised that claim either in the district court or on appeal,[7] this Court should not review it. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, David Sturman's Article III claim is without merit. United States District Judge George W. White presided at every stage of trial. The decision whether to admit into evidence part or all of the depositions was made at trial solely by Judge White, and the pretrial depositions were not part of the "trial" for Article III purposes. While a Rule 15 pretrial deposition may be a critical stage of the "prosecution" (91-1367 Pet. 19, quoting *Gifford*, 892 F.2d at 265)—in the same sense that a post-indictment police lineup is a critical stage of a prosecution for Fifth and Sixth Amendment purposes (see generally *Kirby* v. *Illinois*, 406 U.S. 682 (1972))—it is not, any more than a post-indictment lineup, a stage of "trial" requiring the presence of an Article III judge.

This Court's recent decision in *Peretz*, rather than supporting the Article III claim, actually undercuts it. The Court in *Peretz* held that "no [Article III] structural protections are implicated" by allowing a magis-

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[7] The trial objections, which were argued and/or adopted by petitioner David Sturman on appeal, were "based upon failure to comply with Rule 15, as well as deprivation of the confrontation clause (Sixth Amendment), a deprivation of due process (Fifth Amendment), a denial of assistance of counsel (Sixth Amendment), and a denial of a fair trial (Fifth and Sixth Amendments)." David Sturman C.A. Br. 49 (citing trial transcript). In addition, David Sturman claimed that the Swiss Supreme Court had barred deposition testimony from being used against him. See *id.* at 49-50. Nowhere, however, did any petitioner claim an Article III violation.

trate to conduct jury selection. 111 S. Ct. at 2669. The Court observed, as it had in a prior decision upholding a magistrate's power to make factual findings and legal recommendations on pretrial motions to suppress evidence, that the "ultimate decision" whether to empanel a jury is made by the district court. *Ibid.* (quoting *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980)). The Article III claim in this case is even weaker than those rejected in *Peretz* and *Raddatz*, because Judge White delegated none of his judicial power to Swiss Magistrate Holdener. Instead, the Swiss magistrate's role in the pretrial collection of evidence was no different for Article III purposes than a police officer's supervision and direction of a critical pretrial lineup.

For similar reasons, there is no merit to petitioner David Sturman's claim (91-1367 Pet. 21-22) that the court of appeals' decision "ignores this Court's holdings that due process requires a disinterested judge." The "disinterested judge" in this case was District Judge White, who presided over all aspects of the trial. Petitioners' due process rights were not violated unless the participation of Swiss Magistrate Holdener, whose alleged conflict of interest was his Swiss-authorized role as both prosecutor and magistrate, rendered the depositions themselves fundamentally unfair and unreliable. Cf. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977) (discussing when procedures underlying pretrial identification may be so unreliable as to violate due process). The courts below properly found, in a factbound determination not warranting further review, that petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition[s] unfairly prejudiced the defendants or that the testimony could be considered unreliable." Pet. App.

23a; see also C.A. Jt. App. 1984 (district court finding that defense has not "made a case of bias").

b. Petitioner David Sturman also claims, as do petitioners Levine and Kaminsky (91-1533 Pet. 13-18) and petitioner Reuben Sturman (91-1596 Pet. 23-25), that admitting the deposition testimony violated their Fifth and Sixth Amendment rights to examine and confront witnesses. This Court, however, has never interpreted the Constitution to prohibit all out-of-court statements from being admitted at trial. See *White* v. *Illinois*, 112 S. Ct. 736, 744 (1992) ("the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address"). On the contrary, hearsay evidence may be admitted without violating the Constitution as long as it bears adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. 3139, 3146 (1990) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).[8] Where the evidence falls within a "firmly rooted" hearsay exception, no further showing of reliability is required. *Ibid.*

The hearsay exception under which the deposition testimony was admitted—the ruling allowing "former testimony" of an unavailable witness (Fed. R. Evid. 804(b)(1))—undeniably is firmly rooted. This Court traced the history of the former testimony exception in *Mattox* v. *United States*, 156 U.S. 237 (1895), and more recent cases consistently have held

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[8] A further showing of witness unavailability is necessary where "the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White* v. *Illinois*, 112 S. Ct. 736, 741 (1992) (citing *United States* v. *Inadi*, 475 U.S. 387, 394 (1986)). Petitioners do not dispute that the Swiss witnesses were unavailable to testify at trial.

that hearsay testimony admitted under the former testimony exception satisfies the Confrontation Clause. *Ohio* v. *Roberts*, 448 U.S. at 68-73; *California* v. *Green*, 399 U.S. 149, 165-166 (1970).

Nor is there force to petitioners' suggestion that the Swiss depositions were equivalent to the affidavits that this Court's Confrontation Clause cases condemn. This Court has recognized that "the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates." *California* v. *Green*, 399 U.S. at 156; see also *White* v. *Illinois*, 112 S. Ct. at 745 (Thomas, J., concurring) (common law right of confrontation originated to curtail evidence obtained through magistrates' interrogation of witnesses at pretrial proceedings in which " '[t]he prisoner had no right to be, and probably never was, present' ") (quoting 1 J. Stephen, *A History of the Criminal Law of England* 221 (1883)). Thus, this Court has never required that former testimony be taken under procedures that exactly mirror the trial setting. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 72-73; *California* v. *Green*, 399 U.S. at 165-168; *Barber* v. *Page*, 390 U.S. 719, 725 (1968). The fact that petitioners and their counsel were allowed to be present at the deposition means that, unlike most admissions at trial of out-of-court statements under a hearsay exception, petitioners had the opportunity for a "face-to-face encounter" (*Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988)) with the deponents. In addition, petitioners were permitted, through Magistrate Holdener, to pose whatever questions they wished to the witnesses. Unlike parties against whom hearsay is admitted under other exceptions, petition-

ers thus had the opportunity to cross-examine the deponents.[9]

Petitioners' specific objections to the procedures followed in the Swiss depositions also lack merit. Particularly unavailing is petitioners' objection to the lack of a verbatim transcript, because it was petitioner David Sturman's own Swiss attorneys who objected to the government's suggestion that videotape be used and an American court reporter be present. See Gov't C.A. Br. 93 & n.94.[10] In any event, evidence admitted under the former testimony exception traditionally was introduced by a witness recounting the substance of the prior testimony in cases in which a stenographic transcript was unavailable.[11] See, *e.g.*, *Ruch* v. *Rock Island*, 97 U.S. 693, 694 (1878).[12] Nor did the procedures by which the ques-

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[9] Magistrate Holdener excluded only one question, concerning the salary of one of the witnesses, and petitioners have not asserted that that single exclusion prejudiced them in any way.

[10] David Sturman's Swiss attorney, in objecting to the Swiss government's order that the deposition be held, stated:

> [I]t should be noted that the use of a videotape, as asked for in the request for judicial assistance, is not provided for by the Zurich Code of Penal Procedure and is, therefore, illegal and that the presence of a US court reporter is contrary to art. 271 of the Swiss Penal Code.

C.A. Jt. App. 958.

[11] Given that former testimony may be proved by a witness simply recounting what the declarant said, petitioners' unsupported contention (91-1367 Pet. 27) that the former testimony exception requires a verbatim transcript is mistaken. See 4 D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1079 (1980).

[12] Petitioner's claim (91-1367 Pet. 27-28), raised for the first time in this Court, that the lack of a verbatim transcript

tions were posed to and answered by the witnesses render their testimony so "inherently unreliable" that the Confrontation Clause was violated. See *United States* v. *Salim*, 855 F.2d at 954-955 (rejecting Confrontation Clause challenge to foreign depositions taken in similar manner). The jury was entitled to weigh the procedural context in its consideration of the depositions because the district court instructed that the Swiss judicial system operates "a lot differently" than our system (C.A. Jt. App. 2001) and specifically pointed out that the deposition readings would reflect that the witnesses were permitted to correct and add to their answers (*id.* at 2006).

Equally without merit is petitioners' challenge to the absence of a formal oath. Each witness was admonished by the Swiss magistrate that, while Switzerland does not recognize the oath, a witness who "intentionally makes a false statement * * * will be punished [under Swiss law] with a term of up to five years in the penitentiary or imprisonment." See C.A. Jt. App. 2002. Like an oath administered to American witnesses, that admonition was "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." Fed. R. Evid. 603.

Finally, review of the Swiss deposition issue is not warranted because any error, constitutional or otherwise, was harmless beyond a reasonable doubt. See Gov't C.A. Br. 95 n.98, 126-136. Although petitioners quote pre-disposition statements of the prosecutor

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violated the Court Reporters Act (28 U.S.C. 753(b)) is constitutionally irrelevant and statutorily wrong. That Act applies only to "session[s] of the court" and other specifically designated court proceedings; it has never been interpreted to extend to out-of-court proceedings such as depositions.

regarding the government's need for the depositions (91-1367 Pet. 3-8), those predictive statements do not preclude a court from later reviewing the entire record with the benefit of hindsight to determine whether admission of the evidence can be said to have been harmless. In this case, petitioners ultimately were linked to the Swiss accounts by "[v]olumes of business records from seven foreign banks" that independently were admitted pursuant to a statute authorizing admission of foreign business records (18 U.S.C. 3505). See Pet. App. 39a-42a. Indeed, the lead defense counsel at trial told the district court that "for reasons which are a mystery to me, the government only asked [the Swiss deponents] to address a handful of documents compared to the documents which, once this trial began, the government offered into evidence pursuant to 18 U.S.C. Section 3505." C.A. Jt. App. 1987. In light of that far more substantial evidence linking petitioners to the conspiracy, any error in the admission of the deposition evidence was clearly harmless.

3. Petitioners Levine and Kaminsky (91-1533 Pet. 18-22), as well as petitioner Reuben Sturman (91-1596 Pet. 13-17), seek further review of their claim that 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause. Section 3505 allows the admission of foreign business records if a custodian certifies that they are kept in the regular course of business and if they meet other specified requirements "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The constitutionality of Section 3505 has been upheld by other courts, and this Court has denied certiorari in a case raising the issue. See *United States* v. *Miller*,

830 F.2d 1073, 1076-1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); *United States* v. *Davis*, 767 F.2d 1025, 1031-1032 (2d Cir. 1985); *United States* v. *Hing Shair Chan*, 680 F. Supp. 521, 522-526 (E.D.N.Y. 1988).

This Court has approved one commentator's observation that "[p]roperly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions." *Ohio* v. *Roberts*, 448 U.S. at 66 n.8. Petitioners claim that their Confrontation Clause rights were nonetheless violated because the records in this case were authenticated by affidavits of foreign custodians. Authentication of foreign business records, however, is a threshold matter for the court rather than the jury, and the normal restrictions on hearsay evidence do not apply. 18 U.S.C. 3505(b); Fed. R. Evid. 104(a); see generally *United States* v. *Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987). In any event, hearsay statements of unavailable witnesses may be admitted without violating the Constitution, as long as they bear adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. at 3146; *Ohio* v. *Roberts*, 448 U.S. at 66. Section 3505 is coterminous with the Constitution in this regard, in that it expressly excludes foreign records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The courts below correctly determined that the certificates of the foreign custodians, which contained acknowledgments that the makers were subject to penalties under Swiss law for giving false testimony, contained adequate indicia of reliability. To the extent petitioners wished to challenge the authentications, moreover, they were free to do so during the Swiss depositions of record custodians.

4. Petitioner Reuben Sturman seeks further review in No. 91-1596 of numerous additional claims.

a. First, petitioner claims (Pet. 18-22) that he was entitled to review the government's 1981 submission to Swiss authorities in order to determine whether the government obtained Swiss bank records by accusing petitioner of being an organized crime figure. According to petitioner, such an accusation, which would have been false, allowed the government to obtain bank records to which it otherwise was not entitled under the Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8202 (1973) (*reprinted in* part at 91-1596 Pet. App. 134a-142a). Both courts below reviewed the government submission and concluded it was not false. See Pet. App. 30a. But petitioner would have no standing to challenge the transfer and admission of documents even if the government's 1981 submission was false. Article 37 of the Treaty expressly provides, with certain exceptions not applicable here, that:

> The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty.

See Pet. App. 27a. A defendant thus lacks standing to suppress evidence obtained pursuant to the Treaty or to obtain judicial relief for alleged violations of the Treaty, or matters arising under it. *United States* v. *Davis*, 767 F.2d 1025, 1029, 1030 (2d Cir. 1985); *United States* v. *Johnpoll*, 739 F.2d 702, 714 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *Cardenas* v. *Smith*, 733 F.2d 909, 917-919 (D.C. Cir. 1984).[13]

[13] *Cardenas*, which involved the seizure of Swiss bank accounts in which the plaintiff had an interest, recognized that

b. Second, petitioner claims (Pet. 25-27) that the district judge should have recused himself because, after petitioner was sentenced, the judge acknowledged his personal dislike of the pornography business and stated, "I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with." See Pet. App. 24a n.6 (quoting district court's comments). There is no merit to petitioner's suggestion (Pet. 26-27) that the court of appeals failed to apply the objective standard required under 28 U.S.C. 455 to determine whether a judge should be recused. The court of appeals quoted the statute as requiring a federal judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned" (28 U.S.C. 455(a)) and quoted its own prior case law as requiring a "determin[ation] whether a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." Pet. App. 25a (internal quotations omitted). The court of appeals' case-specific conclusion that the district judge's brief remarks at the close of a protracted proceeding would not cause a reasonable person to question the judge's impartiality is correct and does not warrant further review.

c. Next, petitioner claims (Pet. 27-28) that it was error for the court to impose consecutive fines on

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the Treaty cannot deprive an individual of constitutional rights. See 733 F.2d at 919. The court of appeals held (Pet. App. 28a), however, that petitioner had no constitutional right of privacy in his foreign accounts and that any privacy right "and any remedy given for a violation of that right is limited by the terms of the Treaty." Cf. *United States* v. *Miller*, 425 U.S. 435 (1976).

certain counts because the crime of filing a false income tax return (26 U.S.C. 7206(1)) is a lesser-included offense of attempted tax evasion (26 U.S.C. 7201). Filing a false income tax return is not a lesser-included offense of attempted tax evasion in the traditional sense, however, because tax evasion may be committed without even filing a tax return, and filing a false return may not result in evasion of any tax properly owed. See generally *Spies* v. *United States*, 317 U.S. 492, 499-500 (1943). Some courts have nonetheless held that cumulative punishment should not be imposed if proving the evasion of tax proves the false statement (usually an understatement of income) on the return. See Pet. 28 (citing cases). The court of appeals in this case did not reject the holdings in those cases, but instead distinguished them on the same ground as an earlier court had under facts identical to this case. See Pet. App. 36a-37a (following *United States* v. *Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), cert. denied, 469 U.S. 817 (1984)). *Franks* held that, because proof that a taxpayer evaded paying taxes does not prove that he misrepresented his control over foreign bank accounts, consecutive punishments may be imposed in such a case. That holding is not inconsistent with cases reaching a different result on different facts.

d. Finally, petitioner asks (Pet. 28-29) this Court to consider whether the reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, and its implementing regulations violate the Fifth Amendment privilege against compulsory self-incrimination. The specific statutes and regulations that petitioner violated require taxpayers to report financial interests in, or signature authority over, foreign bank accounts. See 31 U.S.C. 5314; 31 C.F.R. 103.24. The

court of appeals' decision is consistent with decisions of this Court and does not conflict with the decision of any other court.

This Court has held that the Fifth Amendment privilege against compulsory self-incrimination does not allow taxpayers to refuse to answer questions on tax forms merely because the responses may lead the government to uncover illegal sources of income or tax fraud. *United States* v. *Sullivan*, 274 U.S. 259 (1927). Since the "Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds" (Pet. App. 36a), the court of appeals properly distinguished decisions of this Court holding unconstitutional those statutes requiring self-incrimination solely of a "selective group inherently suspect of criminal activity." *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968) (statute requiring reporting and taxing of illegal gambling activities); *Grosso* v. *United States*, 390 U.S. 62 (1968) (similar). Here, as in *Sullivan* and more recent cases of this Court rejecting Fifth Amendment challenges to reporting requirements, the tax form questions "were neutral on their face and directed at the public at large." *California* v. *Byers*, 402 U.S. 424, 429, 433-434 (1971); see also *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 858 n.16 (1984) (in rejecting Fifth Amendment claim, Court distinguished *Marchetti* and *Grosso* on ground that "anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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